No. 11596

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY BRODERICK, INC.,
Appellant

vs.

CLARK SQUIRE, Collector of Internal Revenue,
Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF FOR THE APPELLEE

THERON L. CAUDLE,
Assistant Attorney General.

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TACOMA 2, WASHINGTON

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sessed under the Federal Unemployment Tax Act for the period January 1, 1943 to December 31, 1943, and for the period January 1, 1944, to December 31, 1944, in the sums of $1,042 and $1,380.05, respectively. All of the taxes were paid on August 4, 1945. (R. 29-30.) Claims for refund were filed on August 11, 1945, and were rejected by notice dated January 2, 1946. (R. 30.) Within the time provided in Section 3772 of the Internal Revenue Code and on February 13, 1946, the taxpayer brought an action in the District Court for the recovery of the taxes paid. (R. 30.) Jurisdiction was conferred on the District Court by Section 24, Fifth, of the Judicial Code. The judgment was entered on January 27, 1947 (R. 32-33.) Within three months and on March 17, 1947, a notice of appeal was filed (R. 33-34), pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether real estate brokers who sold real estate for and on behalf of taxpayer were performing services as its employees within the meaning of Section 1426(a) and (b) and Section 1607(b) and (c), Internal Revenue Code.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statute and other authorities are set out in the Appendix, *infra.*

STATEMENT

The facts as found by the District Code in its findings of fact (R. 25-30) may be summarized as follows:

Taxpayer now is and at all times material herein was a corporation duly organized and existing under and by virtue of the laws of the State of Washington. (R. 25.) It was and is one of the leading and well known real estate brokerage firms in the City of Seattle, enjoying the good will of and a reputation for fair dealing with the public. (R. 27.)

During the periods involved each of the brokers whose remuneration became the subject of the tax herein entered into a written agreement with taxpayer. (R. 26, 43-47.)

The brokers agreed to sell real estate for clients of taxpayer on a commission basis. Such sales were made of properties listed with taxpayer and all contractual relationships between the owner of the property and the seller of the property were with the tax-

payer. The commission received from such activity became the property of taxpayer. When a transaction was finally consummated and commissions were paid, taxpayer divided the proceeds of such commission equally between itself and the individual broker who made the sale. (R 26-27.)

Taxpayer maintained an office properly equipped with furnishings and staff suitable to serving the public as a real estate broker. (R. 27.)

Each of the brokers involved was supplied with desk room in taxpayer's office, as well as a telephone, switchboard service and reasonable and necessary stenographic services, and taxpayer in its sole discretion might mention in its advertising the name of the broker engaged in selling. (R. 27.)

All current listings were available to the brokers. However, taxpayer reserved the right to place in the temporary possession of any one of them exclusive privileges of sale. (R. 27.)

Regular sales meetings were attended by both taxpayer's salaried real estate salesmen and the brokers herein involved, though there was no compulsory requirement that the brokers be in attendance. At these meetings discussions were had regarding matters of the business of selling, and assignments of

listed property were made by taxpayer. Any broker could make a choice of listings but this was subject to such limitations as taxpayer might impose. (R. 27-28.)

Either taxpayer or its brokers might terminate the relationship existing between them at will, and generally the brokers were given a free hand as to whether they would devote all or part of their time to the services of selling listed real estate for taxpayer, although, on the other hand, if they should undertake to sell real estate for other brokers or make sales in their own name and on their own behalf they would be considered as violating the obligations they had assumed, and be discharged. (R. 28.)

Each broker paid his own bond premium for broker's license, license fee, business and occupation taxes, car expenses, insurance, and other expenses incident to the conduct of his services as a real estate broker. (R. 28.)

The brokers did not have any regular time or hours, and worked on deals whenever it was convenient for them to do so. They were not required by taxpayer to make any specific calls during the day, and they were not compelled to give their entire time to the business of selling real estate. (R. 28.)

The trial court found as ultimate facts that wages for remuneration for employment were paid by taxpayer to the broker salesmen (R. 28); that these wages were paid by and from funds belonging to taxpayer (R. 29), and that the services were performed by the broker salesmen for taxpayer as its employees (R. 29).

Deficiency tax in the sum of $1,938.63 was assessed for the period April 1, 1943, to March 31, 1945, on the ground that the broker salesmen were taxable employees of taxpayer under the Federal Insurance Contributions Act. Taxpayer paid the deficiency on August 4, 1945. (R. 29.)

Deficiency taxes in the sum of $1,042.00 and $1,380.05 were assessed for the periods January 1, 1943, to December 31, 1943, and January 1, 1944, to December 31, 1944, respectively, on the ground that the broker salesmen were taxable employees of taxpayer under the Federal Unemployment Tax Act. The deficiencies were paid on August 4, 1945. (R. 29-30.)

Taxpayer filed claims for refund of the deficiency payments on August 11, 1945. (R. 30.)

The Commissioner of Internal Revenue, on January 2, 1946, notified taxpayer the claims for refund were disallowed. (R. 30.)

This action was timely brought on or about February 13, 1946 (R. 30.)

SUMMARY OF ARGUMENT

Construing coverage under the Social Security Act in the broad and liberal manner intended by Congress and testing the relationship of taxpayer and its brokers in the light of the various factors which the Supreme Court said should be considered, compels the conclusion that the brokers were employees and not independent contractors.

Decisions of state courts denying coverage to real estate salesmen or brokers under state unemployment statutes are not binding on this Court.

ARGUMENT

I

THE BROKERS WERE EMPLOYEES OF THE TAXPAYER FOR THE PURPOSES OF THE FEDERAL INSURANCE CONTRIBUTIONS ACT AND THE FEDERAL UNEMPLOYMENT TAX ACT

Cases involving the question of coverage under the social security laws have been before this Court on other occasions. *United States v. LaLone*, 152 F. (2d) 43; *United States v. Aberdeen Aerie No. 24*, 148 F. (2d) 655; *Matcovich v. Anglim*, 134 F. (2d) 834,

certiorari denied, 320 U. S. 744; *Anglim v. Empire Star Mines Co.*, 129 F. (2d) 914.

In the *Aberdeen Aerie* case this Court, on the basis of the pronouncement by the Supreme Court in *Labor Board v. Hearst Publications*, 322 U.S. 111, recognized that the old familiar common law principles no longer applied in determining coverage under the Social Security Act and that the applicability of the statute was to be judged instead on the basis of the purposes that Congress had in mind when the statute was enacted. In the case at bar the trial court, following the principle and reasoning of this Court in the *Aberdeen Aerie* case, held that the brokers were taxpayer's employees.

The principle announced in the *Aberdeen Aerie* case, that a liberal interpretation of the employment relationship must be applied in determining coverage under the Social Security Act, was recently fully approved by the Supreme Court in three cases. *United States v. Silk; Harrison v. Greyvan Lines, Inc.*, jointly decided on June 16, 1947 (1 C. C. H. Unemployment Insurance Service, par. 9304); *Bartels v. Birmingham*, and *Geer v. Birmingham*, decided in a single opinion on June 23, 1947 (1 C. C. H. Unemployment Insurance Service, par. 9306). Another case, *Rutherford Food Corp. v. McComb*, decided by the

Supreme Court on June 16, 1947 (15 L. W. 4652), involved the same question of the employment relationship in the application of the Fair Labor Standards Act.

We submit that the principles announced in those cases required an affirmance of the lower court's decision. A detailed statement of those cases in the order in which they were decided is warranted.

THE *SILK* AND *GREYVAN* CASES

In the *Silk* case, *supra*, the taxpayer was engaged in the retail sale of coal. The Commissioner of Internal Revenue determined that the taxpayer was the employer of the persons he engaged to unload coal from the railway cars and those engaged to deliver the coal to his customers. Accordingly, the Commissioner assessed and collected the social security taxes incurred. The coal unloaders were paid a specific price per ton for the coal they unloaded. The unloaders came to work for the taxpayer when and as they pleased and were assigned a car to unload and a place to put the coal. They furnished their own tools, worked when they wished and for others at will. With respect to the truckers, the taxpayer engaged persons who owned their own trucks to deliver coal at a specified price per ton to be paid out of the price

that the trucker received from the customer. The truckers were not instructed how to deliver the coal but merely as to where the coal was to be delivered and whether the charge was to be collected. Any damage caused by the truckers was paid for by the taxpayer. The truckers were free to come and go from the taxpayer's premises, and to refuse to make a delivery. They hauled for persons other than the taxpayer when they pleased, paid all the expense of operating their trucks, and furnished extra help and all equipment necessary. Both the District Court and the Circuit Court of Appeals held that the unloaders and the truckers were independent contractors.

In the *Greyvan* case, *supra*, the Commissioner determined that the truckers engaged by the taxpayer, a common carrier, to perform the actual service of carrying goods shipped by the public, were the taxpayer's employees. Accordingly, the Commissioner assessed and collected the social security taxes with respect to those truckers. The taxpayer there involved operated a trucking business under a permit issued by the Interstate Commerce Commission throughout a large part of the United States and parts of Canada carrying largely household furniture. The truckers undertook to haul exclusively for the

taxpayer, to furnish their own trucks and their own equipment and labor necessary to pick up, handle and deliver shipments, to pay all expenses of operation, to furnish fire, theft and collision insurance specified by the taxpayer, to pay for all loss or damage to shipments, to indemnify the taxpayer against all loss caused by the truckers or their helpers, to paint the designation "Greyvan Lines" on their trucks, to make collections for the taxpayer, to post a $1,000 bond and a $250 cash deposit pending final settlement of accounts, to personally drive or be present on the truck when the helper was driving and to follow all the rules and regulations prescribed by the taxpayer. All trucking contracts were between the taxpayer and the shipper. Under the contract, which was terminable at the will of either party, the trucker received a specified percentage of the price charged to the shipper. All permits and franchises necessary to the operation of the trucks were obtained at the company's expense. The District Court and Circuit Court of Appeals held the truckmen to be independent contractors.

In the single opinion written for both the *Silk* and *Greyvan* cases, the Supreme Court first reviewed the legislative history and the purposes underlying the enactment of the Social Security Act. It was

explicitly held, as the District Court in this case held, that the terms "employment" and "employee" as used in the Act were "to be construed to accomplish the purposes of the legislation"; to alleviate the hardships of unemployment and old age. It was stated that:

> As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

Justice Rutledge in expressing his agreement with the Court's statement of the law paraphrased it in this manner:

> I agree with the Court's views in adopting this [the broader and more factual] approach and that the balance in close cases should be cast in favor of rather than against coverage, in order to fulfill the statute's broad and beneficent objects. A narrow, constricted construction in doubtful cases only goes, as indeed the opinion recognizes, to defeat the Act's policy and purposes *pro tanto*.

In determining the law to be applied and the interpretation to be given to the term "employee", the Court recognized that not all persons who rendered

services were "employees", that the "problem of differentiating between employee and an independent contractor" had been difficult even "before social legislation multiplied its importance", and that there was no " 'simple, uniform and easily applicable test'." The Court rejected the test of tort liability, the "power of control, whether exercised or not, over the manner of performing service" as it was rejected in *Board v. Hearst Publications, supra.* It was stated that there were a number of factors to be considered in determining whether a person was an employee or independent contractor, but that "no one is controlling", and that " 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act'."

While the members of the Court unanimously agreed upon the law to be applied, as summarized above, the application of the law to the particular facts involved in those cases proved difficult and brought forth disagreement. The Court unanimously agreed that applying the law to the question of the status of the unloaders involved in the *Silk* case, those unloaders were employees despite the conclusion of both the District Court and Circuit Court of Appeals

that they were independent contractors. However, in determining the status of the truckers involved in both *Silk* and *Greyvan*, the majority of the Court reached the conclusion that they were not employees, although Justices Murphy, Black and Douglas, dissenting, were "of the view that the applicable principles of law, stated by the Court and with which they agree" would require the conclusion that the truckers also were employees rather than independent contractors. Justice Rutledge, also dissenting, while in agreement as to the law to be applied, would have remanded the case to the District Court for its conclusions based upon correct principles of law stated by the Court, rather than the law erroneously applied by the District Court.

In stating the reasons for the result reached by the majority, it is apparent that there were factors present which indicated even some doubt on the part of the majority for the result reached with respect to the truckers, factors which impelled three dissenting Justices to reach just the opposite conclusion on the same principles of law. The majority of the Court concluded:

> These unloaders and truckers and their assistants are from one standpoint an integral part of the businesses of retailing coal or transporting freight. Their energy, care and judgment may

conserve their equipment or increase their earnings but Greyvan and Silk are the directors of their businesses. On the other hand, the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success.

Both lower courts in both cases have determined that these workers are independent contractors. These inferences were drawn by the courts from facts concerning which there is no real dispute. The excerpts from the opinions below show the reasons for their conclusions.

Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the *Silk* case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases.

There are cases, too, where driver-owners of trucks or wagons have been held employees in accident suits at tort or under workmen's compensation laws. But we agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small busi-

> nessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.

Considering the result reached by the Court with respect to the truckers involved in the *Silk* and *Greyvan* cases and comparing them with the brokers in the case at bar, it is obvious that there is an important factual dissimilarity. In nearly every vital fact the brokers operated in a manner which was not only fundamentally different from the function of the truckers but in most significant respects was diametrically opposed. The most critical of these factors, the one on which the Supreme Court apparently placed the most emphasis, was the capital invested and risked by the truckers in their own trucks and other equipment and the "energy, care and judgment" they used to conserve that equipment. *The brokers had no capital investment and furnished no equipment.*

Considering the general nature of the *Greyvan* drivers' functions, the Supreme Court stated that "their energy, care and judgment may conserve their equipment or increase their earnings" although Greyvan was the director of their business, that they de-

pended "upon their own initiative, judgment and energy for a large part of their success", and that where their arrangement left them "so much responsibility for investment and management, * * * [in] the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management", they were small businessmen and must be held to be independent contractors.

It is difficult to find any of those attributes in the brokers. They had no equipment to conserve, no responsibility for investment or management, and no control to exercise. The fact that the brokers enjoyed considerable latitude in determining when they should work is not important. As the Supreme Court ruled with respect to the unloaders in the *Silk* case, the fact that they "did not work regularly is not significant."

Whatever ingenuity the brokers might use to sell real estate listed with taxpayer in order to increase their earnings did not convert them from employees to independent contractors. The same ingenuity and initiative is characteristic of anybody who works by piece work or on a commission basis. The ingenuity exercised by a waiter to increase his tips and earnings does not make him a businessman or any the less an employee of a restaurant. Taxpayer asserts that

opportunity for profit rested entirely on the brokers' initiative, judgment and energy. (Br. 25.) While we will agree that the amount of a broker's commission increased as his sales increased, we cannot agree that such an amount represented a "profit". To call the remuneration which the broker received a "profit" would be begging the very question here for decision. If the brokers were employees they could not realize "profits" from their sales. Only independent businessmen or corporations realize "profits". The remuneration the brokers received was in the form of commissions and their remuneration increased when they were successful in consummating a sale.

An individual who engages in an independent business ordinarily has a capital investment therein and the risk or opportunity for loss is as great or greater than the opportunity for profit. Here the brokers contributed no capital and took no risk. If they were unsuccessful or if their relationship with taxpayer was terminated, they lost nothing more than their jobs. Taxpayer furnished them a place to work, telephone facilities, stenographic help and all the forms necessary to transact its business. Taxpayer even furnished them with advice. (R. 44-45.) True the brokers furnished their own cars but there was no evidence of how many had cars or that they were

required to have cars. The evidence did not reveal the extent to which the car-owner brokers used their cars in taxpayer's business as contrasted with personal use. We believe this fact is significant, especially when considered in the light of the *Greyvan* and *Silk* cases, because there the truck owners were required to own and use their trucks in order to stay in business. Here there was no evidence to establish that a car was a necessary tool of the real estate business. On the other hand, the evidence showed that individual brokers were ordinarily assigned a special territory in which to work. (R. 105.) It is not unreasonable to assume that a broker who customarily specialized in downtown business property, for instance, had no need for a car. The fact that the brokers and the taxpayer paid for their gasoline and oil as well as their brokers' licenses and bond premium is unimportant. Taxi drivers who were required to do likewise have been held to be employees. *Jones v. Goodson*, 121 F. (2d) 176 (C.C.A. 10th).

While a certain amount of skill was required on the part of the brokers in order to sell real estate, we do not consider this fact persuasive or important. It is true the brokers were required by state statute to possess certain qualifications before they could obtain licenses but this is true of many individuals,

including doctors, lawyers, and scientists who enter the private employment of a firm or corporation. They must pass rigid state examinations or hold degrees from outstanding universities before they are eligible to be licensed.

It seems obvious that the brokers were not "small businessmen" as the truckers involved in the *Silk* and *Greyvan* cases here discussed. In the *Silk* case the truckers could and did hire out their services and their trucks to persons other than Silk. In the *Greyvan* case the truckers had their trucks and equipment to continue in the trucking business whenever they chose to sever their relations with Greyvan. Here, the brokers could not engage in the real estate business in competition with the taxpayer and, upon termination of their employment, they would have no capital investment or equipment, such as office facilities or stenographic help, with which to engage in business.

THE *BARTELS* AND *GEER* CASES

Factually these cases were identical. The taxpayer, a dancehall operator, contracted with the bandleaders to play at his establishment for a specific price, most of the engagements being for one night only. Under the contract involved the bandleader fixed the salaries of the musicians, paid them, told

them what and how to play, provided the sheet music and arrangements, the public address system, and the uniforms. The leader engaged and discharged the musicians, paid agent's commissions, transportation, and other expenses. The contract involved provided that the dance-hall operator was the employer of the musicians and should "have complete control of the services which the musicians would render under the contract". The Supreme Court, reversing the court below, held that the provisions of the written contract were not conclusive in determining who was the employer, and following the *Silk* case, concluded that the "elements of employment mark the bandleader as the employer". The Court pointed to the fact that the leader organized, trained and selected the band and that it was his skill and showmanship that determined the success or failure of the organization; that the relations between him and the other members of the band were permanent whereas the relationship between the operator and the band was transient; that the leader bore the loss and profit after the payment of the musicians' wages and expenses.

The decision in these cases is significant because of the reiteration that the liability for taxes under the Social Security Act is "not to be determined solely by the idea of control which an alleged em-

ployer may or could exercise over the details of the service rendered to his business." Moreover, it is significant that here the taxpayer selected and trained the brokers in much the same manner as the leader in the *Bartels* and *Geer* cases did with respect to his musicians. Taxpayer required that its brokers be men "of substance" who would not be a "detriment," to taxpayer's business. (R. 101.) Taxpayer retained experts in various fields pertaining to real estate and these experts were available to advise the brokers in connection with details being handled by them (R. 44-45.) The fact that taxpayer was interested in obtaining personnel of high quality was entirely understandable since the brokers represented taxpayer rather than themselves, and taxpayer had a good reputation to uphold in the community. But this is not persuasive of an independent contractor relationship. Any business which depends on the public's confidence and good will must seek outstanding men to represent it.

It is further significant that in the *Bartels* and *Geer* cases the relationship between the dance-hall operator and the band was transient whereas the relations between the leader and the other members of the band were permanent. Here the relationship between the brokers and taxpayer was a continuing one.

For instance, one witness, the only broker who testified, stated that he had been connected with taxpayer for eight years. (R. 132.) Ordinarily an independent contractor is engaged to perform a particular piece of work, such as in the case of a building contractor, for instance, to build a building, or in the case of a doctor, to perform a surgical operation. After the services are performed the relationship between the independent contractor and the one for whom he performed services is terminated.

Perhaps the following words taken from the *Bartels* and *Geer* opinion are the most easily applied to the question before this Court:

> * * * in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In *Silk*, we pointed out that permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss from the activities were also factors that should enter into judicial determination as to the coverage of the Social Security Act. It is the total situation that controls.

Applying this language, the Government maintains that the brokers were in "economic reality" dependent upon the taxpayer's business and that they had no economic existence except that which was furnished by the name of taxpayer's business, the tax-

payer's investment, equipment and facilities. Further, it is evident that the permanency of the relationship was virtually the same as that of the musicians with their leader; that the brokers had no investment whatsoever, that little skill was required, that their opportunities for increasing their earnings were limited by the very nature of their occupation, and that risk of loss did not exist. If a broker's relationship with taxpayer was terminated he was, in "economic reality", a man out of a job.

THE *RUTHERFORD FOOD CORP.* CASE

The opinion of the Court in the *Rutherford Food Corp.* case throws a little more light on the result to be reached herein. The question involved was whether certain meat boners were employees of the petitioners within the Fair Labor Standards Act. In considering that question, the Court recognized that "decisions that define the coverage of the employer-employee relationship under the Labor and Social Security Acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act."

The petitioners involved operated slaughterhouses and were engaged in the business of processing meat products and the production of boned beef.

During the period there involved one of the petitioners entered into a written contract with one Reed, an experienced boner, which provided that Reed should assemble a group of skilled boners to do the boning at the slaughterhouse; that Reed should be paid for the work of boning a specified amount per hundred weight of boned beef; that he would have complete control over the other boners, who would be his employees; and that petitioner would furnish a room in its plant for the work and barrels for the boned meat. This contract was subsequently modified in only one substantial respect by providing for the payment of a certain amount of rent for the use of the boning room, although no rent was ever paid. The money paid by the petitioner for the boning was shared equally among all the boners except for a brief time when some of the boners were paid by the person contracting with the petitioner. The boners furnished their own tools, consisting of a hook, a knife sharpener and a leather apron.

In considering the question of whether those boners were employees of the petitioner, the Court noted that boning was one of a series of steps in the petitioners' operations occurring between the time the slaughtered cattle were dressed and the time the boned meat was trimmed for waste by an employee of the

petitioners. The Court also noted that the petitioners never attempted to control the hours of the boners except that they were required to keep the work current and the hours they worked depended in large measure upon the number of cattle slaughtered. The Court further observed that an employee might be one who is compensated on a piece rate basis, citing *United States v. Rosenwasser*, 323 U.S. 360; that railroad station "red caps" were "employees" even though they received their compensation from persons other than employers in the form of tips, citing *Williams v. Jackson*, 315 U.S. 386, and concluded that the boners were employees and not independent contractors within the Fair Labor Standards Act. The Court pointed out that the boners were a part of the integrated unit producing boned beef. This observation is particularly significant inasmuch as the brokers, in the case at bar, formed an integral part of taxpayer's business. Taxpayer could not have stayed in business without their services. The sales made by the brokers constituted more than 84 per cent of taxpayer's total volume of real estate sales; the balance being made by a staff of salesmen who were admittedly taxpayer's employees. (R. 126-127.) The Court made this observation which could well be analogized to the situation here:

The premises and equipment of Kaiser were used

> for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piece work than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.

Taxpayer seems to place reliance on the fact that the agreement entered into by it with each broker provided the broker would be "free from control" of taxpayer "as to the manner and method" of performing his services. (Br. 24.) It is well settled that regardless of the provisions of any contract the courts will look to the factual situation to determine the relationship between the parties. *Bartels v. Birmingham, supra; Griffiths v. Commissioner*, 308 U.S. 355; *Matcovich v. Anglim, supra.*

While the Supreme Court has decided that the factor of control is no more important than any other factor, we believe the evidence in this case would justify, even under the now out-moded "common-law control test", the conclusion that the brokers were employees. Significant in this regard are the following facts:

(1) *The relationship between taxpayer and the brokers was terminable at will.*

The agreement specifically provided that the relationship could be terminated at any time by either party. (R. 47.) The brokers were subject to discharge if they performed services other than to the best interests of taxpayer, such as selling real estate to a rival broker. (R. 102.) The existence of the power to discharge has been held to be one of the most decisive factors. *Williams v. United States*, 126 F. (2d) 129 (C.C.A. 7th), certiorari denied, 317 U.S. 655; *Gulf Refining Co. v. Brown*, 93 F. (2d) 870 (C.C.A. 4th); *General Wayne Inn v. Rothensies*, 47 F. Supp. 391 (E.D. Pa.); *Kentucky Cottage Industries v. Glenn*, 39 F. Supp. 642 (W.D. Ky.).

(2) *The brokers were restricted as to territory and customers.*

Listings were given to certain brokers in a given territory or to certain brokers who specialized in a particular class of property. (R. 99-100.) Whenever taxpayer found it "expedient", a listing could be placed exclusively in a particular broker's hands. (R. 44.) Prospective customers were assigned to designated brokers best qualified, in the opinion of taxpayer's sales manager, to handle the deal. (R. 108.) Thus, taxpayer controlled the amount of work a

broker was privileged to undertake and limited him in the number of customers he could contact.

(3) *The brokers had no identiy of their own.*

There was nothing a broker could do in the real estate business independently of taxpayer. All listings of property and customers were required to be in taxpayer's name. (R. 45.) All negotiations with clients were had in taxpayer's name and taxpayer furnished all the necessary forms. (R. 48-58, 99-100.) The brokers had no privity of contract with the clients. (R. 109.) Taxpayer furnished business calling cards to the brokers on which were printed taxpayer's name and address, as well as the broker's name. (R. 59, 96.) All advertising was done in taxpayer's name, except that taxpayer, in its sole discretion, could mention a broker in the advertisement. (R. 44, 91.)

(4) *Taxpayer regulated the quality and quantity of the brokers' work.*

The brokers were required to work diligently and to exert their best efforts in furtherance of taxpayer's business. (R. 45.) This requirement was wholly inconsistent with an entrepreneurial concept of the relationship. Generally, an independent contractor is free to work whenever and in whatever manner he pleases. Here the brokers, while not required to

punch the clock, had to spend a reasonable amount of time in furtherance of taxpayer's business and, if they did not do so, or if they engaged in business with a rival firm, they could be discharged. The fact that some of the brokers were engaged in outside business activities is not important. Many employees work for more than one employer. Nor is it unheard of for an individual to spend part of his time in employment and the balance of his time in pursuit of an independent business.

(5) *Much of the brokers' time was spent on taxpayer's premises.*

All telephone and stenographic service was rendered in taxpayer's office. Some of the deals were closed in taxpayer's office. (R. 135.) Daily sales meetings were held on taxpayer's premises and, while the brokers were not required to attend, they usually did. (R. 86.) The meetings were presided over by taxpayer's secretary who was also manager of the sales department. The brokers discussed taxpayer's listings and were "asked" to discuss their selling experiences among themselves. (R. 94-95.)

(6) *Taxpayer required the rendition of reports concerning any transactions.*

All property listed or sold or other transactions

by the brokers were reported to taxpayer. The brokers collected the earnest money, delivered it to taxpayer's office and taxpayer deposited it in its bank account. All listings were secured in taxpayer's name and turned over to taxpayer.

(7) *The brokers' services were controlled to the extent required in their line of work.*

While the brokers may have had considerable freedom in their work, it was only the freedom which their type of work required. One would not expect taxpayer to control the details of the brokers' work. Their services were engaged on the assumption that they understood the techniques of selling and, as long as they produced a satisfactory amount of business and did not sell in competition with taxpayer, there was no necessity for detailed supervision of their work.

Taxpayer contends the brokers had a proprietary interest in the commissions earned and that payment of the commissions emanated from the property owners, not from the taxpayer. (Br. 26-29.)

The brokers agreed to sell real estate for taxpayer's clients on a commission basis. Such sales were made of property listed with taxpayer and all contractual relationships between the owner of the property and the seller of the property were with

taxpayer. Whenever earnest money on a deal was given a broker he issued taxpayer's receipt and delivered the money to taxpayer. Taxpayer deposited the money in its own bank account and the full amount was set up on its books in a "Buyer and Seller" account. (R. 72-73, 78-79.) When the deal was finally closed, taxpayer issued its check to the broker in accordance with the terms of the agreement. (R. 45-46, 73, 79, 118-119.) This same procedure was followed in the case of deals handled by tax payer's salesmen, who were admittedly its employees, except the salesmen did not receive their commissions until their regular payday, whereas the brokers were paid as soon as a deal was closed. (R. 75, 81-82, 116-118.) On the basis of these facts the trial court found that taxpayer paid wages from its own funds to the brokers as remuneration for their services. Compensation for services performed in employment is often paid in the form of commissions. The measurement, method, or designation of compensation is immaterial if the relationship of employer and employee in fact exists. Treasury Regulations, 106, Section 402.204, Appendix, *infra.*

The principal case relied on by taxpayer in support of its contention that the brokers had a proprietary interest in the commissions earned is *Koehler v.*

Myers, 21 F. (2d) 596 (C.C.A. 3d). Myers, a real estate salesman, had an oral agreement with Tucker, a broker, to sell real estate listed with Tucker on a commission basis. It was stipulated that Myers had a right to appear at settlements and demand and receive at that time his share of the commission. Myers also had the right to draw in advance on Tucker to the extent of commissions due him on properties which he had sold where settlement had not been made or the commissions earned had not been paid in full. While this arrangement was in effect Myers sold a piece of property but before the commission was paid Tucker became insolvent and a receiver was appointed. Myers sued the receiver contending that the relationship between him and Tucker was that of joint enterprise and that he was therefore entitled to one-half of the commission as his own individual property. The receiver contended that the relationship between Tucker and Myers was that of employer and employee and that therefore Myers was merely a general creditor and must share pro rata with the other general creditors. The court held that no employment relationship existed but that instead Myers and Tucker were engaged in a joint enterprise. The court therefore concluded that when the property was sold, one-half the commission belonged to Myers as his individual

property and that his claim had priority over the general creditors.

At the outset it should be noted that the court in the *Koehler* case was not concerned with whether Myers and Tucker were in an employment relationship within the meaning of the Social Security Act. If it had been so concerned, perhaps it would have applied the liberal interpretation of the relationship intended by Congress and reached a different conclusion.

Moreover, it was stipulated in the *Koehler* case that Myers had a *right* to appear at settlements and to demand and receive his share of the commission. In the case at bar it was shown that the brokers customarily received their checks from taxpayer whenever a deal was closed but there was no evidence that this occurred simultaneously with the payment of the commission by the client or that the brokers either did appear, or had a right to appear, at settlements and to demand and receive their share of the commission at that time. In the *Koehler* case, the salesman had a right to draw in advance to the extent of commissions due him on properties which he had sold where the settlement had not been made or the commissions earned had not been paid in full. Here, a commission was not considered earned until the deal

was finally closed and all monies due or owing by the client had been paid. Taxpayer did not provide a drawing account for the brokers and never made advances to them. (R. 119.) When a deal was finally closed taxpayer issued its check to the broker credited with the sale. Up until that time taxpayer exercised administration and control over all monies received and there was no evidence that any of the brokers claimed any right of ownership or proprietary interest in the fund. No privity of contract existed between the brokers and taxpayer's clients. A breach of contract by a client gave rise to a cause of action in favor of the taxpayer, not the broker. All of these circumstances are wholly consistent with an employment relationship. An employee, particularly a salesman, is often not paid until the customer has settled his account with the employer.

In the *Koehler* case the court decided that the salesman and the broker were engaged in a joint enterprise and that therefore they each had a proprietary interest in one-half of the commission. Here the taxpayer and the brokers have agreed that they did not intend their relationship to be "joint adventurer or partner" (R. 47.), and we submit that the evidence clearly showed they in fact carried out their intention.

II

STATE COURT DECISIONS ON THIS QUESTION ARE NOT CONTROLLING

Taxpayer cites a number of state court decisions which it asserts have denied the application of state unemployment acts to real estate brokers and salesmen. (Br. 29-34.)

It is well settled that a taxing act, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation and state law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent on state law. *Burnet v. Harmel*, 287 U.S. 103. This Court has held itself not bound by state law in its determination of whether "taxi dancers" were covered under the Social Security Act. *Matcovich v. Anglim, supra.*

Moreover, while some state courts have construed their unemployment statutes so as to exclude real estate salesmen and brokers from coverage, others have reached a contrary result. *Babb & Nolan v. Huiet*, 67 Ga. App. 861, 21 S.E. (2d) 663.

In the *Babb & Nolan case, supra*, on facts sub-

stantially identical to those involved here, the court said (p. 865-866):

> * * * It clearly appears from the allegations in the plea and answer that the salesmen in question were under contract to perform services for the defendants, and did in fact perform services, for which they were paid commissions. While it appears that these salesmen had great latitude in working independently of the defendants in selling property, it nevertheless appears from the allegations and from the contract attached that they sold to customers from listings held by the defendants, and that the salesmen received a portion of the commissions and the defendants received a portion. Manifestly, in selling to prospects from which sales the defendants would obtain a portion of the commissions, the salesmen were performing services for the defendants. Under the terms of the contract the legal right to collect commissions on sales made by the salesmen was in the defendants and not in the salesmen. The salesmen were bound to look to the defendants for the payment of their proportionate part of the commissions. The defendants were under obligation to pay the commissions to the salesmen. These commissions were necessarily paid for services rendered. The salesmen therefore were, as provided in the act, performing services for "wages," which term includes commissions, for the defendants.
>
> * * *
>
> It does not appear from the allegations of the plea as amended, or from the contract that the salesmen at any time are free from control or direction as to the performance of their services. They are under obligation to the defendants to regulate their habits so as to maintain the good will and reputation of the defendants, and to

> abide by the law, and to exert their best efforts to sell real estate listed with the defendants. As to these matters the salesmen are necessarily under some control and direction of the defendants. The salesmen have the right to sell only property listed with the defendants. Therefore, the defendants have a control and direction over the salesmen as respects what property the salesmen shall sell. The salesmen are under the control of the defendants in so far as commissions are paid to the salesmen. As has been pointed out, the salesmen have no right to collect commissions from the owners of property sold, but this right is reserved in the defendants.
>
> * * * All the services performed by the salesmen, although perhaps they are not performed in the central office of the defendants, are performed within the limits, territorially or otherwise, of the contract.

Attention is directed to the fact that the Commissioner of Internal Revenue has ruled that real estate brokers are employees within the meaning of the act. Mim. 5504, 1943 Cum. Bull. 1066, 1067-1068, Appendix, *infra*. Admittedly, this ruling is not binding on courts, but it is an administrative interpretation of the statute which is not to be disturbed except for substantial reasons. *Brewster v. Gage*, 280 U.S. 327.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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August, 1947.

APPENDIX

Internal Revenue Code:

SEC. 1426 [as amended by Section 606 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, * * *.

* * *

(b) *Employment.*—The term "employment" means * * * any service, of whatever nature, performed * * * by an employee for the person employing him, * * *.

* * *

(26 U.S.C. 1940 ed., Sec. 1426.)

Section 1607(b) and (c), Internal Revenue Code, as amended by Section 614 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1316 (26 U.S.C. 1940 ed., Sec. 1607), is identical with the above section.

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

Sec. 402.204. *Who are employees?*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the

person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act (see section 402.203).

Section 403.204, Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act, is identical with the above section, in all material respects.

Mim. 5504, 1943 Cum. Bull. 1066, 1067-1068:

* * *

2. The relationship between real estate brokers and salesmen is sufficiently uniform to enable the Bureau of Internal Revenu to take administrative notice of, and rely upon, the established customs and practices in the field, regulatory legislation, and other factors which materially affect the conditions under which real estate salesmen work. The broker operates an independent business, dealing directly with those who engage his services for the buying, selling, and leasing of real estate. The salesman's function is to represent the broker, and whatever business he transacts is the business of the broker. In general practice, a salesman serves only one broker in real estate transactions, and listings obtained by the salesman become the property of the broker. The broker is to a certain extent responsible for the acts of the salesman, and the salesman is under some compulsion to render services in a manner most advantageous to the broker. Regulatory laws in most of the States contemplate that a real estate salesman shall have the privilege of engaging in that occupation, not independently nor in the course of his own business, but only as his activities may be related to and under the supervision of a licensed broker.

3. In the written contract in the case of the O Investment Co., to which S.S.T. 346 related, the salesman agrees to work diligently and with his best efforts to sell, lease, or rent real estate listed with the broker, and to solicit additional listings and customers for the broker. He agrees to regulate his habits so as to maintain and increase the good will and reputation of the broker, and to abide by all of the rules and regulations and code of ethics that are binding upon or applicable to real estate brokers and salesmen. The broker agrees to allow the salesmen to work out

of his office; to make available to the salesmen current listings of the office, except such as he may find expedient to place in the exclusive possession of another salesman for a given period; and to assist the salesman with the work by advice, instruction, and full cooperation. This is typical of most written or oral contracts between real estate brokers and salesmen.

4. It will be noted that such a contract is one of personal service. The salesman has not become obligated to achieve a particular result, and he has no delegable duties. The contract provisions are sufficiently broad to permit the broker to dictate the manner and means for soliciting and transacting business; the broker may determine the listings upon which the salesman may work, and through assignment and reassignment of listings may regulate the activities of the salesman; there are no specific limitations in the agreement on the extent to which the broker may advise and instruct the salesman; and it is not unreasonable to assume that this provision affords the broker ample opportunity to direct a salesman to call on a particular prospect at a given time or to pursue a prescribed sales technique.

5. Brokers customarily provide desk space, telephone facilities, and clerical and stenographic service for their salesmen. The salesmen operate directly from the broker's office; it is the focal point of their activities. There are fixed office procedures. A particular salesmen may remain in the office on a given day each week and handle all, or as much as the broker permits, of the new business coming to the office by telephone and personal call. As a general rule there are sales meetings, and some brokers use the

meetings as a medium for releasing information regarding current listings and for advising and instructing the salesmen in regard to policies, techniques, and other matters pertaining to the business. Leads are furnished, and salesmen are expected to follow them up and report on the progress made. Frequently the broker or his sales manager participates directly in the negotions. The actual contract of sale or lease is executed by the broker or his sales manager.

6. It is not feasible for a broker to exercise complete control over all of the physical activities of his salesmen. A salesman must of necessity have some latitude in determining whom he will solicit and the time and place of solicitation. Interviews with prospects must be arranged at such times and places as the prospects may desire. Moreover, some salesmen do not devote their full time to the business of their brokers. Under the customs, practices, and usual agreements pertaining to salesmen's activities, however, a broker has the right to control the means and methods of such services as the salesmen undertake to perform on behalf of the broker.

7. It is held that real estate salesmen who perform services for brokers under the customs and practices described above are employees of the brokers for purposes of the taxes imposed by Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act, and the Federal Unemployment Tax Act.

* * *